FOR ARGUMENT

No. 87-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL H.,

Appellant,

and

VICTORIA D., a minor by and through her Guardian *Ad Litem*, Leslie Shear,

Appellant,

v.

GERALD D.,

Appellee.

On Appeal from the Supreme Court of California

REPLY BRIEF OF APPELLANT, MICHAEL H.

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A. *The Parties' Factual Contentions*

Given the procedural history and posture of this case, it is wholly inappropriate for Appellee to have proffered to the Court "facts" purporting to 1) minimize the relationship between Michael H. and Victoria D.; 2) denigrate Michael H.'s fitness as a parent; 3) aggrandize Gerald D.'s fitness as a parent; and 4) glorify the family environment created by the marriage of Gerald D.

and Carole D. It is patently obvious that if the California courts had not applied § 621 of the California Evidence Code to preclude inquiry into the factual merits of the parties' contentions all these matters would have been vigorously disputed. While this litigation was pending in the California Superior Court, however, Gerald D. and Carole D. succeeded in limiting discovery solely to matters pertinent to the facial applicability of § 621. Gerald D. then successfully persuaded the court below to apply § 621 to dismiss Michael H.'s case with no inquiry into the merits of any of the matters now asserted by Gerald D. as "facts." Thus, these assertions are not judicially cognizable facts, but merely the self-serving, untested allegations of a party who prevailed on the theory that an inquiry into such factual issues was, as a matter of law, unnecessary.

B. *Due Process*

Appellee's due process argument is that the interests of the state served by § 621 outweigh the "private" interests of Michael and Victoria. Based on that proposition, Appellee states the essence of his position, and, in so doing, concedes the central point of the case:

> Appellants were not afforded a hearing to establish the facts of Victoria's conception because, under Section 621, those facts are not relevant to the question of whether Michael was entitled to recognition as Victoria's father; Appellants were not afforded a hearing to show that visitation with Michael would be in Victoria's best interests because, having determined that Gerald is Victoria's father, the court never reached the question of Michael's right to visitation. Appellee's Brief at 14.

This frank statement of how § 621 operated in this case is clearly accurate. Whether this consequence was constitutionally permissible is the question presented, however, and this Court's rulings clearly show that it is not.

Resolution of the central issue in this case requires a fundamental determination which Appellee's brief never directly addresses—whether Michael H. has a liberty interest in being Victoria's father. Because Michael demonstrated that liberty interest in the ways established by this Court, *i.e.*, by demonstrating "a full commitment to the responsibilities of parenthood," *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) and by "com[ing] forward to participate in the rearing of his child," *Caban v. Mohammed*, 441 U.S. 380, 392 (1979), it is clear that § 621 as applied in this case deprived him of that liberty interest in his parentage and its attendant rights, such as visitation, all without a hearing.

Appellee identifies the state interests pertinent to this case as follows:

1. Promoting marriage;

2. Maintaining a relationship between the child and the mother's husband;

3. Protecting the privacy and integrity of the family relationship.

Brief for Appellee at 24-26.

Conceding the abstract legitimacy of these state interests, however, does not resolve the question presented by this case. These state interests might well be sufficient to justify, in the circumstances covered by § 621, precluding the claims of fathers based solely on a biological connection. This Court has made it clear that a man's biological connection in and of itself does not necessarily create a liberty interest in parentage. *Lehr*, 403 U.S. at 261. In addition, these state interests might justify including consideration of the mother's matrimonial family situation as a pertinent factor in adjudicating the filiation claim of a biological father with an established parental relationship. What Appellee argues,

however, goes much further. He contends that the state interests justify a denial of the right to be heard and that they require Michael H.'s liberty interest to be overborne.

Appellee states that the rule of § 621 is "applicable only in those circumstances where the state's interest in recognizing the [mother's] husband as father are not outweighed by competing interests in according the rights of paternity in another man." Appellee's Brief at 11. Where the "other man" is the biological father who has assumed parental responsibilities for custodial, financial and emotional support and has developed a loving parental bond with the child, this "weighing of competing interests" must employ the fundamental tool of due process—a hearing where the competing interests are propounded, tested and properly analyzed. Only then can the state determine that countervailing considerations justify denying recognition to that biological father's liberty interest in parentage and its attendant rights. Moreover, the state's generalized interest in promoting matrimonial family life is not by itself a sufficient justification for depriving Michael H. of his liberty interest.

This is not a situation where the balancing of a protected liberty interest with other competing private or state interests has led the state to choose a particular *form* of adjudicatory procedure. This is a case where the state has determined that competing state interests justify a denial of any hearing whatsoever. The weight to be given to the rights of biological fathers who have established a liberty interest in their parentage is determined *ab initio* under § 621 to be entitled to *no* due process, either substantive or procedural. Such liberty interests are conclusively presumed to be outweighed.

Appellee attempts to camouflage § 621's constitutional infirmities by arguing that, as interpreted by the California courts, the statute is not applied literally and the presumption is not irrebuttable. In truth, the only case in which the California courts have refrained from ap-

plying § 621 literally to avoid infringing upon a biological father's liberty interest is *In re Lisa R.*, 13 Cal. 3d 636, 119 Cal. Rptr. 475 (1975) where the mother and her husband were dead and the child was a ward of the state. Despite the lip service paid by the California courts to the need for a "balancing" process in the application of § 621, all the cases which have addressed the issue where the mother's husband is a party, including the instant case, have refused to recognize that a biological father can acquire a liberty interest which precludes the state from denying his claim of parentage without a hearing. *See Michelle W. v. Ronald W.*, 39 Cal. 3d 354, 703 P.2d 88 (1985), *app. dism. sub. nom. Michelle W. v. Riley*, 474 U.S. 807; *Vincent B. v. Joan R.*, 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1981), *app. dism. sub. nom. Hall v. Taylor*, 459 U.S. 807 (1982).

What Michael H.'s due process argument amounts to is the unremarkable proposition that the state may not deprive a citizen of a liberty interest without a hearing in which just grounds to do so are established. Perhaps because this proposition is so fundamental, Appellee has distorted and mischaracterized Michael H.'s argument. The most striking example appears at Appellee's Brief at 18:

> The question raised by Michael's appeal is whether the Constitution requires the state to prefer the child's biological father over the matrimonial family into which she was born, even though the mother's husband willingly assumed and has fulfilled the role of the father to the child and the family is in tact [sic] . . . While the Constitution may require the states to provide a procedure for determining the identity of a child's father when his identity is unknown or disputed, it does not require the states to recognize as father the man who impregnated the child's mother.

Michael H. is not asking this Court to command the state to "prefer" him to Gerald D., nor to recognize him as

father solely because he impregnated Carol D. However, Michael developed a relationship with Victoria, parental in all respects, that went far beyond merely having impregnated her mother—or, as stated elsewhere in Appellee's Brief at 3, having "provided the sperm which resulted in Victoria's conception." Therefore, Michael H. is asking this Court to require the state to adhere to the Constitution and afford his acquired liberty interest the protections of due process.

C. *Equal Protection*

Appellee argues that § 621 does not constitute gender-based discrimination against biological fathers because the standing of biological mothers to call for blood tests under § 621(d) is no greater than, and interdependent with, the willingness of biological fathers to acknowledge their paternity. This argument misses Appellant's point. The discrimination cited by Michael H. was not with respect to standing to call for blood tests, but with respect to the more basic issue of the exercise of parental rights. A biological mother is always permitted, absent clear and convincing evidence of unfitness, the rights of her parentage. A biological father who falls within the ambit of § 621, however—even where he has met the criteria for establishing a liberty interest under this Court's decisions, or fits the definition of a "presumed father" under the Uniform Parentage Act, California Civil Code Section 7004(a)(4) ("He receives the child into his home and openly holds out the child as his natural child")—can never assert parental rights unless the biological mother or her husband choose that he do so.

Appellee has completely ignored that portion of Michael H.'s equal protection argument which is based on the fact that § 621 creates a "statutory classification" which "significantly interferes with the exercise of a fundamental right." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1974). As such, the statutory classification "cannot be upheld

unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Id.*

Whether analyzed under the *Zablocki* standard or under the "intermediary" level of review pertaining to gender-based classifications, *Craig v. Boren*, 429 U.S. 190, 197 (1976), § 621 fails of constitutional application in this case. While, as previously stated, the articulated state interests of support, protection and encouragement of the matrimonial family may well be legitimate, the statutory classification is neither supported by these interests nor sufficiently well tailored. The primary deficiency is that § 621 makes no allowance for situations where the putative father's claim is based not merely on biological paternity but on having served as a father-in-fact and on loving and being loved by his child. The statute exempts from its coverage a number of situations where the integrity of the matrimonial family is no less implicated than it is in this case, and where the biological father may have established no liberty interest under this Court's criteria, *viz.* where the mother's husband wishes to avoid paternity; where the mother wishes to establish paternity in a cooperative third party; where the husband is impotent or sterile;[1] where the husband and mother are separated at the time of birth but resume cohabitation thereafter. The statute extends its coverage to numerous situations where there is no integrity to a matrimonial unit to protect, *viz.* the mother and husband are divorced; the husband is deceased; or where, as here, there has been a sufficiently profound breakdown of the matrimonial family that the putative biological father

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[1] The exceptions for impotence and sterility are designed to preclude the application of a conclusive presumption when it is at odds with biological possibility. Given the present technology of blood testing, an HLA exclusion of the Mother's husband equally reflects biological impossibility. *Cf. Clark v. Jeter*, —— U.S. —— (Decided June 6, 1988), slip opinion at p. 8.

has served in a parental role to the child and as a *de facto* mate to the mother and has, for a period of time, lived in a family unit with both.

D. *Conclusion*

The critical elements in this case that Appellee's arguments fail to come to grips with are:

1. Michael H. acted as a father to Victoria, loved her, supported her, took her into his home, held himself out as her father, and was held out as such by her and her mother.

2. Because of the application of § 621 Michael H. was precluded from being heard to preserve and protect his liberty interest as a parent of Victoria.

3. As a consequence Michael H.'s relationship with Victoria has been severed, and he is bereft of all rights concerning her.

Accordingly, Michael H.'s constitutional rights to due process and equal protection of the law have been violated.

Therefore, the judgment below must be reversed.

Respectfully submitted.

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